imposing a fine on him in addition to binding him over, but after considering that he would probably lose his job with the Income Tax Department I decided to forego the fine."

Now it is well established that an Appellate Court will not enhance a sentence unless it is manifestly inadequate or wrong in principle. In considering the present case it is obvious that the learned District Judge gave full weight, very properly, to the circumstances of the respondent, and it is clear that while on the one hand the respondent borne up to now a good character and has been a satisfactory officer in the Income Tax Department, he is of an abnormally sensitive nature, and, to quote the phrase of Dr. Robinson, a mental expert who gave evidence at the trial, is "emotionally immature", an illustration of this weakness being that some years ago after failing in an examination he attempted to commit suicide. His counsel at the appeal put forward an argument to the effect that the spontaneous nature of the assault in circumstances in which it must have been obvious to the respondent that his offence would be witnessed and he himself apprehended was an indication that he had no control over himself at the time. In this connection it must be appreciated that the conviction amounted to a finding by the learned District Judge that the respondent had formed an intention of causing hurt, and it may be also relevant to add that as the law stands the position is, in my view, that it is not a defence open to an accused person to say that he was under the influence of a mere "uncontrollable impulse of the mind" co-existing with the full possession of the reasoning faculties (*vide Halsbury* 3rd Ed. Vol. 10 p. 289) I think a Court dealing with the question of sentence alone must proceed on the assumption that the accused in whom some element of mental instability has been proved is in no different position as far as *mens rea* is concerned from an accused on whose behalf no such plea has been advanced.

I do not think it is open to question that in deciding the appropriate sentence the first and foremost consideration by which the Court should be guided is the public interest. Applying that principle to this case I would say the determining factor is whether it is in the public interest an impression should be created that in a case where an accused has inflicted without provocation on a fellow human being potentially fatal knife wounds the Court may be prepared, because the accused suffers from some temperamental defect or because he has been the victim of misfortune, to inflict a merely nominal punishment? I would say that is not because to hold otherwise may suggest the Courts consider the circumstances of the individual offender are more important than the protection of innocent members of the community from injury to their persons, or from risk even to their lives. In my view the learned District Judge did not give due weight to this aspect of the matter. He was in this case faced with a difficult problem, and clearly gave it most careful consideration. I have also found it a difficult problem myself, and I am glad that I have had the advantage of having had the case for the respondents so ably argued by Mr. Leonard. But after full reflection I have formed the conclusion that the very least sentence which be appropriate is one of six months imprisonment, and I allow the appeal by substituting such a sentence for that passed by the District Judge.

Order accordingly.

Solicitors : *Sisson & Delay.*

KM.N.SP.N. VALLIAMMAI ACHI (f) v. A.R.S. NACHIAPPA CHETTIAR

[C. A. (Mathew C.J., Whyatt C.J. (S) and Rigby J.) September 3, 4, and November 17, 1956]

[Penang — F.M. Civil Appeal No. 20 of 1956]

Action for administration — Breach of trust — Claim by defendant — Third party proceedings — Contribution or indemnity against foreign executrix and another both domiciled and resident outside jurisdiction — Third party proceedings against foreign executrix not properly constituted — Nullity — Practice — Service out of jurisdiction — Rules of the Supreme Court O. 11, r. 1(h) — "Properly brought" — Unconditional appearance by foreign executrix.

By his will dated September 23, 1923, the testator, who died on September 24, 1929, appointed the respondent (the defendant in the main action), the appellant's husband, who died in 1938, and the second third party as his executors. Probate was taken out locally by the respondent only.

The appellant is the executrix named in her deceased husband's will, but did not obtain local probate: administration of his estate was granted locally to 2 attorneys appointed by her, one of whom died before the third party proceedings were commenced.

In an action by the sole beneficiary under the will of the testator brought against the respondent only, judgment was obtained on April 23, 1954 by admission for an account of his administration and for necessary inquiries on the footing of wilful default. The respondent thereafter obtained leave to issue and serve third party notices against the appellant, as executrix of her deceased husband's will, and the second third party outside the jurisdiction, claiming contribution or indemnity against them. Both the appellant and the 2nd third party were served out of the jurisdiction. The appellant entered unconditional appearance. The 2nd third party did not enter appearance.

Both the third parties are domiciled and resident in India.

A motion by the appellant to discharge the order giving leave to issue and serve third party notice out of jurisdiction and to set aside the third party proceedings was dismissed by Spenser Wilkinson J.

Held, by the Court of Appeal, reversing Spenser Wilkinson J.: (1) third party proceedings must be looked at as independent proceedings between the defendant as plaintiff and the third parties as defendants;

(2) a claim against a foreign executor, who has not obtained a grant of probate locally, cannot be maintained

in his or her official capacity and, therefore, the third party proceedings against the appellant were a nullity and she is entitled to have such proceedings set aside *ex debito justitiae;*

(3) a third party notice may be served out of jurisdiction provided that the subject-matter of the claim falls within one or other of the clauses contained in O. 11 r. 1 of the Rules of the Supreme Court;

(4) service outside jurisdiction in respect of a claim for contribution or indemnity can only be effected under O. 11, r. 1(h) and it must be shewn that the person to be served (a) is a necessary and proper party to an action properly brought against some other person; and (b) such other person must have been duly served within jurisdiction;

(5) both the third parties being outside jurisdiction, no action was properly brought against "some other person duly served within jurisdiction";

(6) there was no jurisdiction to grant leave to serve outside jurisdiction, the order giving leave and service thereunder was a nullity and could not be cured by the unconditional appearance of the appellant.

Cases cited :—

(1) *McCheane v. Gyles,* (1902) 1 Ch. 287.

(2) *Barclays Bank v. Tom,* (1923) 1 K.B. 221.

(3) *Re Dewell,* 4 Drewery 269; 62 E.R. 104.

(4) *Debendra Nath Dutt v. Administrator General of Bengal,* L.R. 35 I.A. 109.

(5) *Tyler v. Bell,* 2 My. & Cr. 89; 40 E.R. 575.

(6) *Flood v. Paterson,* 29 Beav. 295; 54 E.R. 640.

(7) *Burns v. Campbell,* (1952) 1 K.B. 15.

(8) *Hilton v. Sutton Steam Laundry,* (1946) K.B. 65.

(9) *Craig v. Kanssen,* (1943) 1 K.B. 256.

(10) *Attorney-General v. Great Eastern Railway Co.,* 27 W.R. 759.

(11) *Emmet v. Emmet,* 13 Ch. D. 484.

(12) *Rahimbhoy Hibibhoy v. Turner,* L.R. 18 I.A. 6.

(13) *Syed Muzhar Hussein v. Bodha Bibi,* L.R. 22 I.A. 1.

(14) *Ramchand Manjamal v. Goverdhandas Vishendas Ratanchand,* L.R. 47 I.A. 124.

(15) *Abdul Rahman v. Cassim & Sons,* L.R. 60 I.A. 76.

(16) *Birmingham & District Land Co. v. London and North Western Railway Co.,* 56 L.T. 702.

(17) *Rich v. Darrett,* 28 Sol. J. 513.

(18) *Barton v. London and North Western Railway,* 38 Ch. D. 144.

(19) *Baxter v. France (No : 2),* (1895) 1 Q.B. 591.

(20) *John Russell & Co. Ltd. v. Cayser, Irvine & Co. Ltd.,* (1916) 2 A.C. 298.

COURT OF APPEAL. Appeal against decision of Spenser Wilkinson J.

Dato Sir Roland Braddell (*B. K. Das* with him) for the appellant.

R. D. Hume (*Ong Huck Lim* with him) for the respondent.

Braddell: Third party proceedings against appellant as executrix of her deceased husband's will, not against her personally. Trial Judge held real subject-matter of action is estate of testator and not of appellant's deceased husband. That is true of the main action, but contribution was being claimed in third party proceedings against appellant's husband's estate. Fallacy in judgment lies in looking at the main action. What should be looked at is third party proceedings, which must be regarded as an independent action between respondent and third parties, and apart from the main action. **McCheane v. Gyles**(1), **Barclays Bank v. Tom**(2).

Appellant is a foreign executrix: she never took out probate locally; administration of her deceased husband's estate granted locally to her 2 attorneys, one of whom is surviving. Surviving attorney is the legal representative. **Re: Dewell**(3), **Debendranath Dutt v. Administrator-General of Bengal**(4).

Appellant cannot be sued as executrix in Malaya. **Williams** on Executors & Administrators, 13th edition, p. 1105 § 1875, **Dicey's Conflict of Laws**, 6th edition, Rule 107, p. 458, **Tyler v. Bell**(5), **Flood v. Paterson** (6).

Not only can appellant not be sued here, she cannot also sue here in Malaya. **Williams** p. 106 §. 164, **Dicey**, Rule 104, p. 450, **Burns v. Campbell**(7), **Hilton v. Sutton Steam Laundry**(8).

Therefore, proceedings against appellant a nullity. **Burns v. Campbell**(7), **Hilton v. Sutton Steam Laundry**(8).

Nullity cannot be waived; therefore, unconditional appearance by appellant did not operate as waiver: she is entitled to have these proceedings set aside *ex debito justitiae.* **Craig v. Kanssen**(9).

If this submission is correct, unnecessary to argue other grounds of appeal.

Hume: Third party proceedings should not be set aside unless Court finds that respondent cannot succeed with or without amendment.

Appellant entered unconditional appearance; then summons for directions. Application to set aside proceedings made a year after directions given. Usual rules as to waiver must apply. **Atkin**, Court Forms & Precedents, Vol: 15, p. 46. Local rule O. 17, r. 8 (3) = R.S.C. (English) O. 16A r. 7(3). Third party procedure greatly extended by Judicature Act, 1925; before that, only contribution and indemnity. Older cases do not apply.

Judge rightly held we are dealing with testator's estate. Judge had discretion to set aside or not; he exercised his discretion.

Braddell in reply: No question of discretion if Court had no jurisdiction.

Braddell, then requested to argue the other grounds of appeal, if not prepared to waive them: Judgment by admission given on 23.4.54 is a final judgment. O. 31, r. 6 = English O. 32, r. 6, **A.G. v. G.E. Rly. Co.**,(10) **Emmet v. Emmet**(11). Respondent's liability to account established; nothing remains to be tried; therefore, final judgment. **Rahimbhoy v. Turner**(12), **Syed Muzhar Hussein v. Bodha Bibi**(13), **Ramchand Manjamal v. Goverdhandas**(14), **Abdul Rahman v. Cassim**(15). No further consideration reserved; therefore, no further consideration possible. **Daniel's Chancery Practice** Vol: I pp. 686 - 7. Under liberty to apply, plaintiff can apply for payment of sums certified to be due. **Atkin**, Vol: I p. 237, Vol: 10 p. 153. Result of judgment of 23.4.54 was to put an end to reasons for third party proceedings. Jurisdiction to issue third party notice can be exercised when there can still be a trial between the plaintiff and defendant, but not later. **Atkin**, Vol: 15, p. 45, **Barclays Bank v.**

Tom, *per* Scrutton L.J.(2), Mallal's Straits Settlements Practice p. 107. Application for third party notice must be made promptly and before close of pleadings, Atkin, Vol: 15, p. 46, **Birmingham & District Land Co. v. L.N.W.R.**(16) and, for directions, before trial. **Rich v. Darrett**(17). Submit, Court had no jurisdiction to issue third party notice after final judgment. If Court had discretion, such discretion was exercised wrongly.

Third party notice can only be issued when all questions as between plaintiff and defendant and between defendant and third parties can be tried and settled in one action. **Baxter v. France (No. 2)**(19). Being a representative action, what was admitted or pleaded by respondent is binding on his co-executors, in the absence of fraud or collusion. Injustice was caused to appellant as she cannot file defence, interrogate or take part in trial of main action, no trial being possible. **Barton v. L.N.W.R.**(18), **Baxter v. France (No. 2)**(19).

Jurisdiction to grant leave to serve third party notice out of jurisdiction is governed by O. 11 r. 1 = English O. 11 r. 1, which is a complete code. In this case, service could only be ordered under clause (h) = English clause (g). Before this can be applied there must be (a) an action properly brought and (b) a person duly served within jurisdiction.

No one served within jurisdiction. Submit, there was no jurisdiction to give leave to serve out of jurisdiction. **McCheane v. Gyles**(1), **John Russell & Co. Ltd. v. Cayser, Irvine & Co. Ltd.**(20) and, therefore, order for service is a nullity; and nullity, unlike irregularity in procedure, cannot be waived even by unconditional appearance. **Craig v. Kanssen**(9). Submit second third party not before court; therefore, claim under third party notice cannot be finally settled between respondent and the 2 third parties. **Baxter v. France (No. 2)**(19).

Hume: Order of 23.4.54 not a final judgment. Cases cited in **Annual Practice** only authority for determining time for appeal. **Annual Practice**, 1956 p. 1248. As to judgment by admission, O. 31 r. 6, **Mallal** p. 199.

All matters in this action not settled. Defence under s. 60 Trustee Ordinance, 1949, claiming relief cannot be decided by Registrar on taking of accounts but by Court. As to service, respondent has been served within jurisdiction. Judgment against second third party can be obtained by default.

The Court unanimously allowed the appeal and intimated that the reasons would be given at a later date.

Mathew C.J. (delivering the judgment of the Court) :— This is an appeal from a decision of Spenser Wilkinson J. declining to set aside an order of the Court dated the 13th August, 1954 giving leave to one A. R. S. Nachiappa Chettiar, the defendant in a civil action then pending, to issue a Third Party Notice to KM. N. SP. N. Valliammai Achi and N. S. N. Nachiappa Chettiar claiming contribution or indemnity, and declining to set aside all subsequent proceedings in relation to that order.

The facts leading up to the making of that Order for Third Party directions to issue are briefly as follows :—

In July, 1952 one S. S. RM. S. Kasi Viswanathan Chettiar instituted proceedings against the defendant A. R. S. Nachiappa Chettiar as Executor and Trustee of his father's estate claiming an inquiry and accounts to be taken relating to the defendant's management of that estate between 1923 and approximately 1942. A defence to that claim was delivered in December, 1952. The defendant by his Statement of Defence gave an account of his administration of the estate and stated that he had at all material times acted in accordance with the directions of his co-trustees KM. N. SP. Nachiappa Chettiar and N. S. N. Nachiappa Chettiar and, after the death of KM. N. SP. Nachiappa Chettiar, in accordance with his widow, Valliammai Achi's instructions.

In April, 1954, upon the plaintiff's motion for judgment, the Court gave judgment upon certain admissions made by the defendant in his defence and directed that certain specific inquiries be made and accounts taken on the footing of wilful default. On the 4th August, 1954 the defendant took out a Summons for leave to issue and serve on Valliammai Achi, the Executrix of the estate of the said KN. N. SP. Nachiappa Chettiar, deceased, and N. S. N. Nachiappa Chettiar, a Third Party Notice claiming contribution and indemnity, and also for leave to serve the said Notice out of the jurisdiction of the Court. On the 13th August, 1954 that application, made *ex parte,* was granted. On the 28th December, 1954 an appearance was entered by KM. N. SP. N. Valliammai Achi, whom I shall subsequently refer to as "the appellant". No appearance had, at any time, been entered by, or on behalf of, the other Third Party.

On the 28th January, 1955 upon a Summons for directions, an Order was given for pleadings to be delivered.

On the 25th May, 1955 a Statement of Claim was filed by the defendant, whom I shall hereafter refer to as "the respondent", against the appellant "the Executrix of the estate of KM. N. SP. Nachiappa Chettiar". By paragraph 13 of that Statement of Claim the respondent claimed "against the said KM. N. SP. N. Valliammai Achi, as such Executrix as aforesaid, to be indemnified against the plaintiff's claim .....".

On the 30th January, 1956 the appellant, through her Solicitors, filed a Notice of Motion that the Third Party Notice be discharged and all subsequent proceedings therein be set aside. That Notice of Motion was supported by affidavit. Amongst the Grounds put forward for setting aside the Third Party Notice was the ground that "the proceedings against the Third Party in her capacity as Executrix of the estate of KM. N. SP. Nachiappa Chettiar, deceased, are invalid and incompetent in that she is a foreign Executrix and has not applied for probate within the jurisdiction of this Honourable Court". That Motion was heard and dismissed by the learned trial Judge on the 17th April, 1956 and it is from that formal Order of dismissal that this appeal now comes before us.

A number of grounds of appeal were taken by Sir Roland Braddell in the course of his argument before

us, but in our view two of them were of sufficient weight and consideration as to leave us in no doubt that this appeal ought to be allowed.

It is abundantly clear from the pleadings that the respondent's claim for contribution or indemnity was against the appellant not in her personal capacity but as Executrix of the estate of her deceased husband.

The Summons-in-Chambers dated the 4th August, 1954 asked "for leave to issue and serve on KM. N. SP. N. Valliammai Achi, the widow and executrix of KM. N. SP. Nachiappa Chettiar, since deceased . . ." a Third Party Notice claiming contribution or indemnity. The affidavit in support of that Summons repeatedly refers to the respondent's deceased husband — "the 3rd Managing Trustee" — as being concerned in the management of the estate. The Order made by the learned trial Judge gave liberty to serve and issue a Third Párty Notice on the respondent, "the widow and Executrix of KM. N. SP. Nachiappa Chettiar, since deceased."

The appellant's husband died in India in 1938 and in 1939 Letters of Administration with Will annexed were granted to two persons as her attorneys, in the Federation. One of those two persons subsequently died leaving one L. R. M. Ramasamy Chettiar as the surviving Executor of the respondent's deceased husband's estate within the jurisdiction of this Court.

It is clear from the documents before us that the appellant is a foreign Executrix resident in India. She has never set foot in Malaya and has never obtained probate in Malaya. It is elementary law that a foreign personal representative cannot be sued in his or her official character in this country unless he (or she) can be sued as Executor (or Executrix) *de son tort* or unless he (or she) has obtained a grant of probate or letters of Administration in this country. In our view these Third Party proceedings as against the appellant were a nullity.

The learned trial Judge considered that submission when it was put before him and dealt with it as follows : —

"Mr. Das's fourth submission is one which at first sight appeared to have some force. The argument is that there is really no cause of action against the Third Party because she is not the administrator in this country and that it is the local administrator here who should have been sued. The point is put in this way in paragraph 1(b) of the Affidavit of Sathappa Chettiar of the 30th January, 1956:—

> I am advised and verily believe that the defendant's cause of action, if any, for contribution or indemnity is against the said L.R.M. Ramasamy Chettiar (the local surviving administrator) as the only person representing his estate in Malaya and the action against the said Valliammai Achi in her capacity as foreign executrix is misconceived.

"The words 'his estate' abovementioned refer to the estate of K.M.N.SP. Nachiappa Chettiar, the deceased husband of the Third Party. This argument might have been sound if the accounts in dispute in the main action concerned the estate of K.M.N.SP. Nachiappa Chettiar, but the real subject matter of the action is the estate not of the Third Party's deceased husband but the estate of S.S.R.M. Ramasamy Chettiar, of whose will the Third Party's deceased husband was the third trustee."

With the very greatest respect, in our view, the last sentence of that passage shows a misconception as to the true nature of the Third Party proceedings instituted by the respondent against the appellant as Executrix of her deceased husband's estate. Whilst it is true that the real subject matter of the main action concerned the accounts relating to the estate of S. S. R. M. Ramasamy Chettiar, the Third Party Notice and the pleadings in relation thereto consisted of a claim to indemnity or contribution as against the estate of the appellant's deceased husband. The effect of the Third Party proceedings was to constitute a separate action — an action between the defendant and the Third Party — within the main action. In the words of Cozens-Hardy L.J. in *McCheane v. Gyles*[1] (quoted with approval by Scrutton L.J. in *Barclays Bank v. Tom*[2]) the Third Party procedure is : "analogous to a cause instituted by the defendant as plaintiff against the Third Party". The result is, therefore, that the Third Party Notice claiming contribution or indemnity as against the deceased's estate should have been instituted against L. R. M. Ramasamy Chettiar, the local surviving administrator, and not against Valliammai Achi, a foreign Executrix who had not taken out probate in this country. It has been argued that since the appellant had entered an unconditional appearance to the Third Party Notice issued to her she had thereby waived any irregularity in the Notice and submitted to the jurisdiction of this Court. We do not think that such an argument is tenable. The Third Party Notice issued to her as foreign executrix who had not taken out probate in this country was not a mere irregularity; it was a nullity. Being a nullity it could not be validated by her entry of unconditional appearance, and the appellant was therefore, entitled to have that Order set aside *ex debito justitiae* (See *Hilton v. Sutton Steam Laundry*[8], p. 71, and *Craig v. Kanssen*[9]).

There is, in our view, an equally substantial ground on which this appeal should be allowed.

On the 13th August, 1954 the learned trial Judge gave leave to issue and serve a Third Party Notice on the appellant, KM. N. SP. N. Valliammai Achi, and by the same Order, gave leave to such service to be effected on her in India out of jurisdiction. The Order further provided that such service be effected within three months from the date of the Order. In fact, such service was not effected on the Third Parties till the 28th November, 1954. On the 1st April, 1955 the Court made an Order that such service "be deemed good and sufficient service". I assume for the purposes

of this argument that the Court had power to grant that Order.

A Third Party Notice may be served out of the jurisdiction provided that the subject matter of the claim in respect of which that Notice is issued falls within one or other of the clauses contained in Order 11 rule 1 of the Rules of the Supreme Court which deals with service out of the jurisdiction. It is quite clear and is indeed conceded, that the only clause applicable in this case is Order 11 rule 1(h) which enables service out of jurisdiction wherever "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction".

Before, therefore, there can be service out of jurisdiction it must be shown that the person to be served :—

(1) Is a necessary or proper party to an action properly brought against some other person; and
(2) Such other person must have been duly served within the jurisdiction.

Now what had to be considered is not an action brought by the plaintiff against the defendant, but the subsidiary action brought by the defendant, the present respondent, against the Third Parties (the appellant and the co-trustee) for contribution or indemnity. The position is clearly stated in the case of *McCheane v. Gyles*[1]. We cannot do better than quote the words of Romer L.J. in the course of his judgment, at page 300, in which he says :—

"What we have to consider in this case is, 'Is this third party notice, were it in form a writ of summons, capable of being served out of the jurisdiction upon a third party?' In considering that question one must have regard to the parties, that is, not to the claim of the plaintiff in the action, but to the claim of the defendant against the third party. You must treat the claim of the defendant against the third party as if it were a claim on a writ of summons, and see if that claim comes within the rules as to the service of writs out of the jurisdiction, that is, within Order XI, r. 1. If it does, then leave can be given for the service; if not, leave cannot be given. In my opinion, it is plain here that there is no case for giving leave, because the case cannot be brought within one of the provisions of Order XI, r. 1. For the purpose of considering whether service of a third party notice out of the jurisdiction should be allowed, you have nothing to do with the subject-matter of the claim in the action itself: you can only look at the nature of the claim made by the notice and the position of the person who is sought to be served. The rules are really plain, and the matter is, in my opinion, free from doubt."

In this case the claim for contribution is solely against the parties in India. There was, therefore, no "action properly brought against some other person duly served within the jurisdiction." In our view, therefore, leave ought not to have been granted to serve the appellant and the other Third Party out of the jurisdiction.

Nor do we consider the position has been affected by the appellant having entered an unconditional appearance and therefore can be said to have submitted to the jurisdiction of the Court. Before leave could properly be granted for service out of jurisdiction it was an essential pre-requisite that an action should have been properly brought against some person duly served within the jurisdiction. The words "properly brought" fell to be considered by the House of Lords in the case of *John Russell & Co. Ltd. v. Cayser, Irvine & Co. Ltd.*[20]. In that case Their Lordships held that the words "properly brought" clearly enure to the protection of the person out of the jurisdiction whom it is proposed to serve with the process. Lord Wrenbury in the course of his judgment, at page 306, stated :—

"'Properly brought' in this rule means, I think, or at any rate includes, brought with a due observance of the process of the Court against a person who could properly be served with the process of the Court, and not because he chooses voluntarily to submit himself to the jurisdiction of the Court. That has not happened here. The exact question for determination is this: Can one defendant by consent by submitting to the jurisdiction confer jurisdiction as against another defendant? My Lords, in my opinion he cannot. I think the action mentioned in Order XI, rule 1(g), as one 'properly brought' means an action brought by a plaintiff against a defendant by virtue of the user of the process of the Court — not by user of the process with the addition of a voluntary submission by the defendant to the jurisdiction of the Court."

In our view, therefore, the service out of the jurisdiction was not a mere irregularity that could be cured by entry of appearance : it was a nullity which went to the root of the matter and, on the authorities to which we have earlier referred (*Hilton v. Sutton Steam Laundry*[8] and *Craig v. Kanssen*[9]) the appellant was entitled to have the Order set aside.

On these two grounds alone we were of the opinion that this appeal should be allowed with costs.

Appeal allowed.

Solicitors : *Lim, Lim & Oon; Ong Huck Lim & Co.*

KWONG FOONG & CO.
v. WHANG TAR CHOUNG

[O.C.J. (Wilson J.) September 16, 1955]

[K. L. — Originating Motion No. 3 of 1955]

Trade Marks — Application for registration — Application opposed — Onus on opponent to satisfy that the application ought to be refused — Material date to be determined.

This was an appeal against the refusal of the Registrar of Trade Marks to register a trade mark in respect of edible oils made by the applicant. The application was dated June 9, 1952 and was published in the Gazette on June 17, 1954. Opposition to the registration of the trade mark was made by the respondents who, at some date subsequent to the application, and prior to the hearing thereof, had in fact lodged an application for registration of a similar trade mark in respect of edible oils. The Registrar found that the trade marks were almost identical and held that the onus was on